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Supreme Court, U.S
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In The

Supreme Court of the United States

OSCAR D. GUZMAN-SANTANA,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,
UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether "INA § 212(h), 8 U.S.C. § 1182(h) [hereinafter '§ 212(h)'], which denies discretionary relief from removal to Legal Permanent Residents (LPRs) convicted of an aggravated felony, but makes such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony, violates the equal protection guarantees afforded all aliens under the Fifth Amendment"?

2. Whether the Ninth Circuit should have addressed the question of the right to § 212(h) relief pursuant to the rationale of *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002), *judgment rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003), particularly where § 212(h), which denies discretionary relief from removal to LPRs convicted of an aggravated felony, contradicts international law without specific Congressional intent therefor?

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) and its order denying the petition for rehearing (App. 7a) are unreported. The order of the District Court (App. 8a-18a) is unreported. The opinion of the Board of Immigration Appeals ("BIA") (App. 3a) is unreported. The opinion of the Immigration Judge ("IJ") (App. 4a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2004, and its order denying the petition for rehearing was entered on August 31, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V.

2. The Equal Protection Clause of the Constitution provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

3. INA § 212(h), 8 U.S.C. § 1182(h) (hereinafter "§ 212(h)"), which is set out in the appendix (App. 19a-22a), states in relevant part:

> No waiver shall be granted under this subsection **in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony** or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

(Emphasis added.)

STATEMENT

Petitioner Oscar D. Guzman-Santana ("Mr. Guzman"), is a 41-year-old hardworking, taxpaying, lawful permanent alien from El Salvador with over 23 years of continuous residence in the United States[1] Mr. Guzman is eligible for relief from removability[2] in the form of adjustment of

[1] Mr. Guzman was admitted to the United States as a lawful permanent resident alien on or about November 15, 1989, over 15 years ago, pursuant to the amnesty program under the Immigration Reform and Control Act ("IRCA"), of 1986 on account of his having resided continuously in this country since 1981, over 23 years ago.

[2] On or about September 25, 2001, the Department of Homeland Security ("DHS"), formerly the Immigration and Naturalization Service ("INS"), issued a Notice to Appear charging Mr. Guzman with removability under §237(a)(2)(A)(iii) (alien convicted of an aggravated felony) as defined in § 101(a)(43)(G)") I.&N. Act, 8 U.S.C. §1101(a)(43)(G) (hereinafter "§101(a)(43)(G)") (theft or burglary offense for which the term of imprisonment is at least 1 year) as a result of his guilty plea to a violation of California Penal Code § 459 (1st degree residential burglary) on June 15, 2000 for which he was sentenced to the low term of 2 years on September 15, 2000.

status under § 245, I.&N. Act, as amended, 8 U.S.C. § 1255 (hereinafter "§ 245")[3] in conjunction with a §212(h) waiver[4] in every aspect except for his having "previously

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[3] Deportable aliens in removal proceedings such as Mr. Guzman are statutorily eligible for relief from removability pursuant to §245 if (1) they were inspected and admitted or paroled into the United States, (2) they make an application for §245 relief, (3) they are eligible to receive an immigrant visa and are admissible to the United States for permanent residence, and (4) an immigrant visa is immediately available to them, *see* §245. Mr. Guzman met all such requirements except the second part of number 3 due to his § 459 conviction; nevertheless, he could file a §245 application if he could simultaneously file a §212(h) application to waive such conviction. Accordingly, on or about April 15, 2002, Mr. Guzman's spouse who is a United States citizen filed a Form I-130 (Petition for Alien Relative) on his behalf and he filed a Form I-485 (application for adjustment of status) under § 245).

[4] Deportable aliens in removal proceedings are generally eligible for a waiver of inadmissibility under §212(h) in relevant part if (1) they are the spouse, parent, son or daughter of a United States citizen or permanent resident, and (2) their removal would cause severe hardship to such relative or relatives; moreover, deportable aliens who committed an aggravated felony (except for murder) are also eligible for §212(h) unless they have "previously been admitted to the United States as an alien lawfully admitted for permanent residence," §212(h); accordingly, aliens who are not permanent residents or who are permanent residents now but were not when they committed the offense are eligible for such relief, *see generally*, Gordon, et al., 5 IMMIGRATION LAW AND PROCEDURE §63.03[11][f] (titled "Waiver Under INA § 212(h)") (Matthew Bender & Co. Sep. 2003) and Kesselbrenner & Rosenberg, IMMIGRATION LAW AND CRIMES, §10.4 (titled "Waiver Under §212(h)") (Thomson/West 08-2003); consequently, Mr. Guzman is eligible for §212(h) relief except for his having "previously been admitted to the United States as an alien lawfully admitted for permanent residence"; therefore, on or about April 15, 2002, Mr. Guzman filed a Form I-601 application for a waiver of his California Penal Code § 459 conviction pursuant to § 212(h) wherein he listed as qualifying relatives his spouse who is a United States citizen and his 2 children, ages 15 and 14, who are United States citizens and his stepdaughter, age 20, who is a lawful resident alien; moreover, if he is deported to El Salvador said qualifying relatives will suffer severe hardship since he and they are united by strong emotional, religious,

(Continued on following page)

been admitted to the United States as an alien lawfully admitted for permanent residence," *see* § 212(h) and *Taniguchi v. Schultz I*; moreover, he is also eligible for such relief by extension of the rationale set forth in *Beharry v. Reno*, *supra*, which to date has not been addressed by the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I. The instant appeal involves the decision of the Ninth Circuit Court of Appeals in *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002) (hereinafter "*Taniguchi v. Schultz I*"), which holds, in agreement with the Seventh[5] and Eleventh[6] Circuits, that § 212(h), which denies discretionary relief from removal to legal permanent residents (LPRs) convicted of an aggravated felony, but makes such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony, does not violate the Equal Protection Clause of the Constitution. Such decision requires review by the Supreme Court of the United States, not only because it is erroneous, *see Taniguchi v. Schultz*, 332 F.3d 1205, 1208 (9th Cir. 2003) (Pregerson, J., dissenting, joined by Reinhardt, J.; *en banc*) (hereinafter "*Taniguchi v. Schultz II*"), a copy of which is appended in the appendix (23a-30a), and will result in manifest injustice due to its potential impact on numerous persons within the ranks of the millions of LPRs in the United States, but for the following reasons. First, it involves an important federal statutory issue concerning "a bedrock

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cultural, economic and community ties in the United States and they will be separated from him.

[5] *See Lara-Ruiz v. INS*, 241 F.3d 934, 947-48 (7th Cir. 2001).

[6] *See Moore v. Ashcroft*, 251 F.3d 919, 925-26 (11th Cir. 2001).

principle of our law 'that all individuals in the United States – citizens and aliens alike – are protected by the Due Process Clause of the Constitution,'" *Taniguchi v. Schultz II* at 1206. Second, it is contrary to the Supreme Court's "evolving concept of membership in alienage jurisprudence," Liliana M. Garces, *Evolving Notions Of Membership: The Significance Of Communal Ties In Alienage Jurisprudence*, 71 S. Cal. L. Rev. 1037 (1998). And third, it will not only potentially impact "numerous persons within the ranks of the millions of LPRs in the United States" but third parties (such as family members, employers, friends, schools, churches, hospitals, and businesses) and governmental services such as the military and the Internal Revenue Service.

II. Moreover, the Petition should be granted because the Ninth Circuit, though the issue was properly before it, failed to address the question of the right to § 212(h) relief for LPRs convicted of an aggravated felony pursuant to the rationale of *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002), *judgment rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003) (hereinafter "*Beharry v. Reno*"), which reasoned that:

> [C]ertain non-self-executing treaties inform interpretation of domestic statutes, and that absent clear congressional intent to depart from such treaties, an inconsistent domestic statute should be construed so as not to violate international law.

J. Ryan Moore, *Reinterpreting The Immigration And Nationality Act's Categorical Bar To Discretionary Relief For "Aggravated Felons" In Light Of International Law:*

Extending Beharry v. Reno, 21 Ariz. J. of Int'l & Comp. L. 535, v (2004). Moreover, it is important that the Supreme Court remand the case to the Ninth Circuit to address this issue because its failure to do so below will result in manifest injustice due to the potential impact on "numerous persons within the ranks of the millions of LPRs in the United States" who will be denied § 212(h) relief due to the statute's categorical denial of such relief to LPRs convicted of an aggravated felony in contradiction with international law without specific Congressional intent therefor.

ARGUMENT

I. Section 212(h), Which Denies Discretionary Relief From Removal To Lawful Permanent Residents (LPRs) Convicted Of An Aggravated Felony, But Makes Such Relief Available To Illegal Aliens (Non-LPRs) Who Are Convicted Of An Aggravated Felony, Violates The Equal Protection Guarantees Afforded All Aliens Under The Fifth Amendment.

A. Mr. Guzman Is Protected By The Due Process And Equal Protection Clauses Of The Constitution.

It is undisputed that by means of incorporation within the "due process" clause, U.S. CONST. amend V, aliens such as Mr. Guzman are entitled to "the equal protection of the laws," U.S. CONST. amend XIV, § 1:

> It is a bedrock principle of our law "that all individuals in the United States – citizens and aliens alike – are protected by the Due Process Clause of the Constitution." *Garberding v. INS*, 30 F.3d 187, 1190 (9th Cir. 1994) (citing *Matthews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)).

> Furthermore, "[i]t is equally well established that the Due Process Clause incorporates the guarantees of equal protection." *Id.* (citing *Johnson v. Robison*, 415 U.S. 361, 364, n. 4, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974)).

Taniguchi v. Schultz, 332 F.3d 1205, 1206 (9th Cir. 2003) (Pregerson, J., dissenting, joined by Reinhardt, J., *en banc*) (hereinafter "*Taniguchi v. Schultz II*").

B. A Careful Examination Of The § 212(h) Discrimination Against LPRs Who Have Been Convicted Of An Aggravated Felony Under The Rational Basis Standard Reveals Not Only That It Is Irrational On Its Face But That Is Bears No Rational Relationship To A Legitimate Government Purpose Thereby Rendering It Violative Of The Equal Protection Clause.

A discriminatory classification such as in the case herein is examined in the following manner in order to determine if it satisfies the Equal Protection Clause:

> A classification which does not involve suspect criteria or fundamental rights if examined under the relatively relaxed rational basis standard which requires that the classification rationally or reasonably furthers a legitimate governmental purpose, objective, or interest. Such classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike.

16B C.J.S. Constitutional Law § 716. Moreover:

> [U]nder the rational relation test, a challenged classification scheme may be invalidated only if it is arbitrary **or** bears no rational relationship to a legitimate state purpose, or if the classification rests on grounds wholly irrelevant to the achievement of the state's objective, and if no set of facts can reasonably be conceived to justify it.

Id. (Emphasis added.)

1. An Examination Of § 212(h) On Its Face Reveals That Its Classification Scheme, Which Disfavors LPRs Who Have Been Convicted Of An Aggravated Felony But Favors Non-LPRs So Convicted, Is Based Solely On Immigration Status And That It Is Therefore Irrational Since It Is Inconsistent With Congress' And The Supreme Court's Favorable Historical Treatment Of LPRs Over Non-LPRs.

Section 212(h) on its face creates a classification scheme which discriminates against LPRs who have been convicted of an aggravated felony solely on the basis of their immigration status:

> [It] denies discretionary relief from removal to Legal Permanent Residents (LPRs) convicted of an aggravated felony, but makes such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony[.]

Taniguchi v. Schultz II at 1206.

An historical examination of the treatment of LPRs *vis-a-vis* non-LPRS by Congress and the Supreme Court, however, reveals that it is irrational to treat non-LPRs more favorably than LPRs solely on the basis of immigration status:

> The Supreme Court has emphasized that LPRs "like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In Re Griffiths,* 413 U.S. 717, 722, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973). For this reason, both Congress and the Supreme Court have historically treated LPRs more favorably than non-LPRs. . . .

Id. at 1206. Clearly, then, for this reason alone § 212(h) on its face is violative of the Equal Protection clause; moreover, there are also practical reasons which support such conclusion:

> I also believe that § 212(h) is fundamentally unfair because unlike its beneficial treatment of non-LPRs, § 212(h) punishes LPRs who are immigrants that have taken a positive step to become lawful members of America society. Section 212(h) in effect rewards aliens who have committed two crimes – an unlawful entry and an aggravated felony – while punishing aliens who have committed only one crime – an aggravated felony.

Id. at 1206.

2. An Examination Of The Underlying Rationale Attributed To Congress By The Ninth Circuit in *Taniguchi v. Schultz I* In Order To Establish That The § 212(h) Classification Scheme, Which Discriminates Against LPRs Who Have Been Convicted Of An Aggravated Felony, Reveals That It Does Not Rationally Further A Legitimate Governmental Purpose Since It Is Contrary To The Text And Purpose Of § 212(h) And The "Evolving Concept Of Membership In Alienage Jurisprudence."

The Ninth Circuit in *Taniguchi v. Schultz,* 303 F.3d 950 (9th Cir. 2002), attributed two "legitimate governmental purposes" to Congress and attempted to establish that its § 212(h) classification scheme was rationally related to such purposes. On the one hand, it reasoned that LPRs "pose a higher risk for recidivism than illegal aliens," are less deserving of a "second chance," and should be held to a higher standard since their "substantial rights and privileges not shared by other aliens" and their "strong ties to the United States through both employment and family relationships" were insufficient to deter their criminal conduct, *id.* at 958. The Ninth Circuit's premise *Taniguchi v. Schultz I,* based on employment and family relationships, however, "is contrary to the text and purpose of § 212(h)" since employment and close "family ties are [also] a prerequisite for non-LPRs to obtain relief under § 212(h)," *Taniguchi v. Schultz II* at 1207 n.2:

> So here's the rub, non-LPRs eligible to receive § 212(h) discretionary relief, under the panel's rationale, would be influenced by the "deterrents" to

> committing an aggravated felony that the panel assumed LPRs exclusively possess: United States-based families and employment to support their families

Id. at 1207. Moreover, the Ninth Circuit's premise in *Taniguchi v. Schultz I* that an LPRs "substantial rights and privileges not shared by other aliens" is a deterrent to criminal conduct is contrary to the Supreme Court's "evolving concept of membership in alienage jurisprudence," *see* Liliana M. Garces, *Evolving Notions Of Membership: The Significance Of Communal Ties In Alienage Jurisprudence,* 71 S. Cal. L. Rev. 1037 (1998), since it does not "recognize the significance of communal ties involved in the question of membership," *id.* at 1053, and does not account "for real factors in the lives of noncitizens that contribute to their being members of U.S. society," *id.*:

> The recognition of a noncitizen's communal ties to U.S. society is an acknowledgement of that individual's allegiance to the country. This notion understands membership in a community to be evidenced by factors beyond citizenship status,[7] such as a person's connections and contributions to the social economic spheres of society. It also recognizes the government's actions toward a noncitizen can result in hardships for innocent third parties who are U.S. citizens. Traditionally, the Supreme Court has based the measure of a person's allegiance to the United States solely on citizenship status, which is acquired by

[7] "It is her place of residence, education, and work, **regardless of the presence or absence of a formal certificate.**" Liliana M. Garces, *Evolving Notions Of Membership: The Significance Of Communal Ties In Alien Jurisprudence,* 71 S. Cal. L. Rev. 1037, 1054 (1998) (emphasis added).

> birthright or by taking a formal oath of allegiance to this country. This historical approach ignored the fact that allegiance to the country can be measured in terms of an individual's developed affinity to the particular community in which the individual resides. This rather vague notion can be objectively determined by examining factors such as the length of time a person has resided in the U.S. territory, the extent of an individual's family connections in the country, and whether an individual has pursued educational or job opportunities in the country which have allowed him to contribute to society. Together, these factors symbolize an individual's allegiance to the United States because they show the commitments and loyalties to American society that citizenship status supposedly entails.

Id. at 1053-1054. Also, "the notion that 'aggravated felon LPRs [are] less deserving of a second chance than non-LPRs'" is illogical. *Taniguchi v. Schultz II* at 1207-1208.

On the other, the Ninth Circuit reasoned in *Taniguchi v. Schultz I* that its classification scheme was a "rational 'first step' toward the legitimate goal of rapidly removing criminal aliens" from the United States, *id.* at 958. Such premise, however, is irrational:

> If Congress' intent was to remove criminal aliens, §212(h) is not a rational step toward this goal because it makes relief available to people who have committed two crimes while barring relief to those who have committed only one. There is not rational basis for Congress to effectuate its "first step" in streamlining the removal process for dangerous aliens by treating LPRs and non-LPRs differently; a more rational distinction

> would be based on the nature of the crime rather than on an alien's immigration status.

Taniguchi v. Schultz, II at 1208.

II. The Ninth Circuit Should Have Addressed The Question Of The Existence Of The Right To § 212(h) Relief For LPRs Convicted Of An Aggravated Felony By Extending The Rationale Set Forth In *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003), Particularly Where § 212(h), Which Denies Discretionary Relief From Removal To LPRs, Contradicts International Law Without Specific Congressional Intent Therefor.

The United States District Court in *Beharry v. Reno, supra,* held:

> . . . The statutory provision "No waiver shall be provided . . . if . . . the alien has been convicted of an aggravated felony" should be narrowly construed so as to accord with international law. That can be done by ruling that section 212(h) waivers are available for aliens, including petitioner, who meet its stringent requirements of seven years residence and "extreme hardship" to family – if theses aliens have been convicted of an "aggravated felony" as defined after they committed their crime, but which was not so categorized when they committed the crime.

Id. at 605. The Court in *Beharry v. Reno, supra,* reasoned that:

> [C]ertain non-self-executing treaties inform interpretation of domestic statutes, and that absent clear congressional intent to depart from

> such treaties, an inconsistent domestic statute should be construed so as to not violate international law.

J. Ryan Moore, *Reinterpreting The Immigration And Nationality Act's Categorical Bar To Discretionary Relief For "Aggravated Felons" In Light Of International Law: Extending* Beharry v. Reno, 21 Ariz. J. of Int'l & Comp. L. 535, v (2004).

Even though Mr. Guzman properly raised the issue of the existence of the right to § 212(h) relief for LPRs convicted of an aggravated felony by extending the rationale set forth in *Beharry v. Reno, supra,* to the case herein, the Ninth Circuit failed to address it.

A. The Case Should Be Remanded To The Ninth Circuit In Order For It To Address Mr. Guzman's Arguments Regarding The Existence Of The Right To § 212(h) By Means Of An Extension Of The Rationale Set Forth In *Beharry v. Reno, supra,* Especially Since It Overlooked Material Points Of Fact Resulting In The Misapplication Of *Cacoperdo v. Demosthenes,* 37 F.3d 504, 507 (9th Cir. 1994) Rather Than The Application Of The Rationale In *Restrepo v. McElroy,* No. 99-2703, 2004 WL 652802 (2nd Cir. April 1, 2004).

On April 15, 2002, Mr. Guzman filed his §212(h) application before the Immigration Judge ("IJ") together with a pre-hearing statement which argued that he was eligible therefor because §212(h) violated the equal protection clause to the United States Constitution; moreover, he relied on the same rationale for establishing his eligibility

for §212(h) relief at his hearing before the IJ on May 9, 2002 and before the Board of Immigration Appeals ("BIA") in his notice of appeal filed June 3, 2002 and in his brief to the BIA filed September 24, 2002.

On or about October 28, 2002, Mr. Guzman filed his petition for writ of habeas corpus before the United States District Court below wherein he gave notice to the government that, in addition to his argument that the BIA had erred in holding that § 212(h) did not violate the equal protection clause, there was a reasonable possibility that he may be eligible for §212(h) relief under the rationale advanced in *Beharry v. Reno, supra*:

> 15. The BIA's decision and order of September 27, 2002, constitutes a denial of Mr. Guzman's due process rights, *see Muro-Inclan v. INS,* No. 00-50016, 2001 WL 476948 (9th Cir. 05-08-01), for the following reasons:
>
> A. The record in the case herein raises the reasonable possibility that Mr. Guzman may be eligible for relief from removal pursuant to *Beharry v. Reno,* 2002 U.S. Dist. LEXIS 757 (January 22, 2002), U.S. Senior District Judge Jack B. Weinstein, accordingly, the IJ was required to so inform Mr. Guzman and to give him a reasonable opportunity to develop such issue, *see* 8 C.F.R. § 240.49(a), *U.S. v. Arrieta,* 224 F.3d 1076, 1079 (9th Cir. 2000) and *United States v. Arce-Hernandez,* 163 F.3d 559, 563 (9th Cir. 1998)[.]

Moreover, Mr. Guzman's memorandum of points and authorities in support of his petition was accompanied by a copy of an article entitled "Decision in **Beharry v. Reno** Presents Innovative Avenue of Relief For Aggravated Felons," located at 7 No. 6 *Bender's Immigration Bulletin*

308 (Matthew Bender & Co. 2002), which explicates the rationale for Mr. Guzman's contention that he is also eligible for §212(h) relief under the rationale set forth in *Beharry v. Reno, supra.*

On January 21, 2003, the government filed its return in opposition to the petition wherein it set forth its argument in this regard at Section III.C thereof:

> C. GUZMAN IS NOT ELIGIBLE TO APPLY FOR RELIEF FROM REMOVAL UNDER ,8 U.S.C. 1182(h)
>
> Guzman concedes that he is not eligible to apply for adjustment of status unless he can obtain a waiver of his deportability under 8 U.S.C. § 1182(h). He presents two arguments why the immigration judge should have allowed him to apply for such a waiver.
>
> 1. *Guzman Would Not Qualify For Relief Under Beharry*
>
> Citing *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002), Guzman apparently argues that the immigration judge violated Article 3 of the United Nations Convention on the Rights of the Child. The *Beharry* court ruled that
>
> > section 212(h) waivers are available for aliens, including petitioner, who meet its stringent requirements of seven years residence and "extreme hardship" to family – *if these aliens have been convicted of an 'aggravated felony' as defined after they committed their crime, but which was not so categorized when they committed their crime.*

On February 12, 2003, Mr. Guzman filed his traverse which responded in relevant part to the government's opposition regarding his claim that there was a reasonable possibility that he was eligible for §212(h) under the rationale set forth in *Beharry v. Reno, supra.*

Mr. Guzman clearly raised his *Beharry v. Reno* claim in his petition for writ of habeas corpus. The Ninth Circuit, then misapplied *Cacoperdo v. Demosthenes,* 37 F.3d 504, 507 (9th Cir. 1994) to the case herein. Moreover, even if Mr. Guzman had not raised such issue in his petition for writ of habeas corpus the court should have applied the rationale in *Restrepo v. McElroy, supra,* wherein:

> At the outset of its analytical discussion, the court of appeals agreed with the government that the 'specific ground upon which the district court granted habeas corpus has been fatally undermined by our subsequent case law analyzing the AEDPA's retroactive reach . . . '

81 Interpreter Releases 491, 492 (April 12, 2004). But, the Court went on to conclude:

> [T]hat the application of the AEDPA to the petitioner '**may be impermissibly retroactive on a different rationale,**' and on that basis, it vacated the district court's judgment and remanded the case for further proceedings.

Id., at 494 (emphasis added).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record
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(619) 235-0143

Counsel For Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSCAR D. GUZMAN-SANTANA, Petitioner-Appellant, v. JOHN ASHCROFT, Attorney General; et al., Respondent-Appellees.	No. 03-56074 D.C. No. CV-02-02125-IEG MEMORANDUM* (Filed April 26, 2004)

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Submitted April 22, 2004**

Before: O'SCANNLAIN, RYMER, and BEA, Circuit Judges.

Oscar D. Guzman-Santana, a native and citizen of El Salvador, appeals the district court's denial of his 28 U.S.C. § 2241 habeas petition. We have jurisdiction under 28 U.S.C. § 2253, we review de novo, *see Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999) and we affirm.

Guzman-Santana contends that a waiver of inadmissibility pursuant to 8 U.S.C. § 1182(h) violates his right to equal protection as an immigrant who had been admitted to this country as a legal permanent resident prior to committing an aggravated felony. This contention is unpersuasive. *See*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Taniguchi v. Schultz, 303 F.3d 950, 957-58 (9th Cir. 2002) (holding that there is a rational basis for denying the waiver to aggravated felon LPRs but not to other aliens).

Guzman-Santana next claims a due process violation because the immigration judge failed to inform him of the possibility for relief. This contention lacks merit. *See United States v. Garza-Sanchez,* 217 F.3d 806, 810 (9th Cir. 2000) (stating that an immigration judge is only required to inform the respondent of statutory grounds for relief from deportation found in the immigration laws); *see also Larita-Martinez v. INS,* 220 F.3d 1092, 1095 (9th Cir. 2000) (requiring a showing of prejudice in order to prevail on a due process claim).

We decline to address Guzman-Santana's general international law contention raised for the first time in his traverse. *See Cacoperdo v. Demosthenes,* 37 F.3d 504, 507 (9th Cir. 1994) ("A Traverse is not the proper pleading to raise additional grounds for relief.").

Finally, Guzman-Santana's contention that the BIA's streamlining procedure violates due process is foreclosed by *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 850-51 (9th Cir. 2003). His argument that the holding in *Falcon Carriche* does not apply to the specific facts of his case is frivolous.

AFFIRMED.[1]

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[1] To the extent that petitioner argues that this panel should overrule current Ninth Circuit case law, that is no possible. *See Benny v. U.S. Parole Commission*, 295 F.3d 977, 983 (9th Cir. 2002) ("We are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.").

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A92-464-273 – San Diego Date: Sep. 27, 2002

In re: *S-GUZMAN-SANTANA, OSCAR DOLORES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Montes, Armando M., Esq.

ON BEHALF OF SERVICE: Ted Y. Yamada, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Diego, California

File No.: A 92 464 273 May 9, 2002

In the Matter of	)	IN REMOVAL
	)	PROCEEDINGS
OSCAR DOLORES *GUZMAN*-SANTANA a/k/a OSCAR *GUZMAN*	)	
Respondent	)	

CHARGE: Section 237(a)(2)(A)(iii), I&N Act – Convicted of the aggravated felony offense of burglary, as defined in Section 101(a)(43)(G).

APPLICATIONS: Termination of proceedings; adjustment of status in conjunction with Section 212(h) waiver.

ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE:

Raul M. Montes, Esquire Ted Y. Yamada, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 39-year-old married alien, a native and citizen of El Salvador, whose status was adjusted to that of a lawful permanent resident, pursuant to the Amnesty provisions on November 15, 1989.

On June 15, 2000, the respondent was convicted upon his guilty plea in a California criminal court, in Case No. FV108240, of burglary in the 1st degree, pursuant to

Section 459 of the California Penal Code, and received a sentence of two years (Exhibit 10).

In September of 2001, the respondent was placed in proceedings and charged with being deportable as an alien convicted of an aggravated felony, a burglary offense for which the term of imprisonment imposed was at least one year. *See* Section 101(a)(43)(G) of the Act.

At the proceedings, the respondent admitted the truthfulness of the factual allegations set forth in items 3, 4, 5, and 6, but denied that conviction and sentences set forth in items 7 and 8 and, therefore, also denied deportability. He argued that as a spouse of a United States citizen, that he was eligible for adjustment of status in conjunction with Section 212(h) waiver.

First of all, though deportability is denied, the admission by Mr. Guzman that he is an alien, coupled with the record of conviction for burglary in the 1st degree, with the result and sentence of two years, establishes respondent's deportability by evidence that is clear and convincing, as required by Section 240(c)(3)(A) of the Act. Section 101(a)(43)(G) defines the term "aggravated felony", as a theft offense (including receipt of stolen property) or a burglary offense, for which the term of imprisonment is at least one year.

Second, it has been determined that the respondent does not qualify for adjustment of status in conjunction with Section 212(h) waiver, because the respondent has been admitted to this country as a lawful permanent resident and, has been convicted of an aggravated felony since the date of such admission. *See Matter of Yeung*, Int. Dec. 3297 (BIA 1996) (holding that an alien who has been admitted to the United States as a lawful permanent

resident and, who has been convicted of an aggravated felony since the date of such admission, is ineligible for a waiver under Section 212(h) of the Act). *See also United States v. Arrieta*, 224 F.3d 1076 (9th Cir. 2000). Inasmuch as the respondent remains inadmissible to the United States, as an alien convicted of a crime involving moral turpitude, under Section 212(a)(2)(A)(i)(I) of the Act, he is ineligible for adjustment of status under Section 245 of the Act. Notwithstanding that he is the beneficiary or potentially the beneficiary of an approved immediate relative visa petition, filed by his spouse.

Further, an Immigration Judge is unable to rule on the constitutionality of laws enacted by Congress and, therefore, is unable to address the respondent's constitutional arguments. *See e.g., Matter of Fuentes-Campos*, Int. Dec. 3318 (BIA 1997).

Lastly, the respondent may not be granted voluntary departure because he is deportable under Section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony. *See* Section 240B(b)(1)(C).

Accordingly, the following order will be entered.

ORDER

IT IS ORDERED that the respondent be removed from the United States to El Salvador on the charge contained in the Notice to Appear.

JOHN C. WILLIAMS
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OSCAR D. GUZMAN-SANTANA, Petitioner-Appellant, v. JOHN ASHCROFT, Attorney General; et al., Respondents-Appellees	No. 03-56074 D.C. No. CV-02-02125-IEG Southern California (San Diego) ORDER (Filed Aug. 31, 2004)

Before: O'SCANNLAIN, RYMER, and BEA, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied. No further filings shall be accepted in this closed appeal.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

OSCAR D. GUZMAN-SANTANA, Petitioner, vs. JOHN ASHCROFT, Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, and TIMOTHY S. AITKEN, acting district director of the United States Immigration and Naturalization Service, San Diego District, Respondents.	CASE NO. 02-CV-2125-IEG (JFS) **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS** [Doc. No. 1] (Filed Jun. 2, 2003)

Presently before the Court is Oscar D. Guzman-Santana's ("Petitioner") petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. For the reasons discussed below, the Court **DENIES** the petition.

BACKGROUND

Petitioner is a thirty-nine years-old native and citizen of El Salvador, who came to this country in 1981. (Pet.'s Memo. at 4). He was admitted to the United States as a lawful permanent resident on or about November 4, 1989. (*Id.*) On June 15, 2000, Petitioner pled guilty to first degree residential burglary (violation of Cal. Penal Code § 459) and on September 15, 2000 was sentenced to two years in prison. (*Id.*); (Return at 2). In September 2001, the Immigration and Naturalization Service ("INS") placed Petitioner in removal proceedings, charging him with

deportability as an aggravated felon due to his September 2000 burglary conviction. (Pet.'s Memo. at 4-5; Return at 2).

Pursuant to 8 U.S.C. § 1182, and in an effort to obtain relief from removal, Petitioner filed an application for adjustment of status pursuant to 8 U.S.C. § 1255 in conjunction with an application for a waiver under 8 U.S.C. § 1182(h)(a "§ 212(h) waiver"). (Pet.'s Memo. at 5). After a hearing on May 9, 2002, the immigration judge ("IJ") determined that Guzman was not eligible for the relief sought and ordered him removed from the United States. (Return at 5).

On June 3, 2002, Petitioner appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). (Pet.'s Memo. at 5). On September 27, 2002, the BIA, pursuant to 8 C.F.R. § 3.1(a)(7), affirmed the IJ's decision in a two-sentence opinion stating, that "[t]he Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination." (Pet.'s Memo., at Exh. I (citation omitted)).

On Octobeer 28, 2002, Petitioner filed the present petition for a writ habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner makes five separate arguments, each as a separate basis for relief.[1] In particular, Petitioner contends

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[1] Although Petitioner articulates five separate arguments in support of his writ for habeas corpus, the Court finds that Petitioner's first and second enumerated arguments require no significant discussion. First, Petitioner contends that he is eligible for relief from deportability under 8 U.S.C. § 1255. (Pet.'s Memo. at 6). Yet, Petitioner admits that because of his burglary conviction, he fails to meet an essential requirement for relief. (*Id.*) Second Petitioner asserts that he is eligible for a 8 U.S.C. § 1182(h) waiver of inadmissibility. (*Id.* at 6-7).

(Continued on following page)

that he was denied due process on two grounds: (1) that the BIA affirmed the IJ's decision without opinion, and (2) that the IJ failed to consider and inform Petitioner that he was eligible for relief from removal under *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002). (*Id.* at 7). Petitioner also contends that 8 U.S.C. § 1182(h) violates his right to equal protection. (*Id.*)

DISCUSSION

I. Due Process

A. Legal Standard

"The Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted). The due process clause guarantees persons a full and fair hearing, which requires that the case be "evaluated on its own merits to determine whether the alien's factual support and concrete evidence are sufficient to meet the alien's burden of proof." *Larita-Martinez v. I.N.S.*, 220 F.3d 1092, 1095 (9th Cir. 2000) (citations and quotation omitted). To prevail on a due process challenge to a deportation proceeding a party must prove both error and substantial prejudice. *Id.* (citing *Lata v. I.N.S.*, 204

Yet, Petitioner later admits that he is ineligible for the desired relief because he was "previously . . . admitted to the United States as an alien lawfully admitted for permanent residence." (*Id.* at 7 (quoting 8 U.S.C. § 1182(h)). Because Petitioner admits in both arguments that he is not eligible for relief under either section, the Court finds no basis for relief as to either argument and therefore **DENIES** his petition as it relates to the first two arguments. Accordingly, the Court focuses its discussion on the remaining three arguments.

F.3d 1241, 1246 (9th Cir. 2000) (citations omitted)). The court will not presume substantial prejudice; it must be demonstrated by a showing that the alleged violation affected the challenged outcome. *Id.*

1. Summary Affirmance

8 C.F.R. § 3.1(e)(4) authorizes the members of the BIA to affirm the decisions of immigration judges without opinion under some circumstances.[2] Petitioner argues that

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[2] This section of the CFR was recently modified. The current regulation is substantially the same as the previous regulation, except that it provides that any board member assigned a case may affirm a decision without opinion. In the previous regulation, at 8 C.F.R. § 3.1(a)(7) (2002), the Chairman of the BIA designated a single permanent member of the Board to review decisions when the Chairman deemed that such a procedure was appropriate. The procedure itself did not change. The new regulation, to be codified at 8 C.F.R. § 3.1(e)(4) reads, in pertinent part:

(4) Affirmance without opinion. (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and to not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 3.1 (e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in

(Continued on following page)

the summary affirmance process deprives him of his right to due process because it (1) departs from analyzing cases on a case-by-case basis; (2) uses only one judge instead of a three-judge panel to review the case; (3) fails to issue an opinion that includes the court's reasoning and justification for the decision; and (4) fails to properly consider Petitioner's application for cancellation of removal.

Although the Ninth Circuit has not addressed the constitutionality of 8 C.F.R. § 3.1(e)(4)[3], "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties" *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978). Indeed, the power to promulgate the summary affirmance process is within the discretion of the INS. *Albathani v. INS*, 318 F.3d 365, 377 (1st Cir. 2003).

Petitioner first argues that the summary affirmance process violates his right to due process because it departs from the "long established policy of deciding relief applications on a case-by-case basis." (Pet.'s Memo., p. 2). Yet, Petitioner does not cite to evidence that demonstrates that the BIA judge who issued the summary affirmance did not

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the decision of the immigration judge or the Service were harmless or nonmaterial.

67 Fed Reg. 54,878, 54903 (August 26, 2002) (final rule).

[3] In holding that it did not have jurisdiction to address a similar constitutional challenge to the predecessor regulation, 8 C.F.R. § 3.1(a)(7), the Ninth Circuit held that "jurisdiction over constitutional issues and statutory issues is withdrawn from the courts of appeals and . . . the place to resolve such issues is in the district courts through habeas corpus." *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1069 (9th Cir. 2003).

individually review his case. Furthermore, the Court declines to infer that the summary affirmance process permits the BIA judge to not decide the case on its own merits merely because the BIA has adopted a workload management device. *See Albathani*, 318 F.3d at 379 ("These are workload management devices that acknowledge the reality of high caseloads. They do not, either alone or in combination with caseload statistics, establish that the required review is not taking place.").

Next, Petitioner argues that the fullness and fairness of his BIA appeal was "call[ed] into question" because a single member of the BIA and not a three-judge panel reviewed his case. (Pet.'s Memo. at 2). Due process requires that a party receive a full and fair hearing, which in turn requires a court to evaluate each case on its own merits. *Larita-Martinez*, 220 F.3d at 1095. Although the opinion in this case citing the summary affirmance regulation is terse, Petitioner presents no facts that demonstrate that his case was not evaluated on its own merits. In fact, to determine whether a case is appropriate for the summary affirmance process, the Board Member to whom the case is assigned must review the case on its own merits. Specifically, the text of the regulation under which the BIA affirmed in this case (the predecessor regulation) states that

> [t]he single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harm or nonmaterial; and that

> (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or
>
> (B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

8 C.F.R. § 3.1(a)(7)(ii) (2002). This language is substantially similar to the text of the current regulation. *See* Footnote 2, *supra*. Without any evidence to the contrary, the Court finds that a BIA Member cannot determine whether a particular case is appropriate for summary affirmance without individually reviewing the merits of each case.

Petitioner next argues that his constitutional right to due process was violated because the summary affirmance "failed to issue an opinion discussing the evidence and the reasons for its determination 'sufficiently so that in the event of judicial review, a court [would] be able to know its basis.'" (Pet.'s Memo. at 2-3 (quotation omitted)). The First Circuit addressed this issue *Albathani v. INS*, 318 F.3d 365. The *Albathani* court held that although the summary affirmance process may be problematic because it allows the BIA to adopt the IJ decision even when the BIA disagrees with the IJ's reasoning, that does "not render the scheme a violation of due process or render judicial review impossible." *Id.* at 377. The court reasoned that a reviewing court will still have the IJ's decision and record to review and therefore the "agency" has provided a reasoned basis for its decision. *See id.* (citing *SEC v.Chenery Corp.*, 332 U.S. 194, 196-97 (1946)). The Court agrees with the *Albathani* analysis.

Furthermore, as noted by the *Albathani* court, the Ninth Circuit, even prior to the promulgation of the summary affirmance regulations, judicially permitted the BIA to state merely that it affirms the IJ's decision so long as the BIA has given the case individualized consideration. *Alaelua v. Ins*, 45 F.3d 1379, 1382-83 (9th Cir. 1995). Because the summary affirmance process ensures that each case is given individualized consideration, as discussed above, the *Albathani* holding is not in conflict with the precedent of this Circuit.

Finally, Petitioner argues his right to due process was violated because the BIA "[f]ailed to show proper consideration of his application for cancellation of removal under § 245 in conjunction with 212(h) thereby giving the appearance it had prejudiced the case." (Pet.'s Memo. at 3). Petitioner fails to provide the Court with any reason or indication that the BIA's decision did not show proper consideration of his cancellation of removal argument. Even assuming, *arguendo*, that the BIA's alleged failure to properly consider Petitioner's argument for cancellation of removal was an error, because Petitioner admits in his moving papers that he is not eligible for relief under § 212(h) in conjunction with § 245, (*Id.* at 6-7), Petitioner cannot show substantial prejudice since the BIA's alleged failure to properly consider his arguments would not have affected the BIA's decision. *See Larita-Martinez*, 220 F.3d at 1095 (citation omitted).

Therefore, the Court holds that the BIA's summary affirmance process does not violate Petitioner's right to due process.

2. Beharry v. Reno

Petitioner's second due process claim is that the IJ failed to inform him of his possible eligibility for relief from removal under *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002). (Pet. Memo., p. 3). Failing to advise an alien of his possible eligibility for relief from deportation violates the alien's right to due process if it appears that the alien is eligible for relief. *United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998) (citing *Moran-Enriquez v. INS*, 884 F.2d 420, 422 (9th Cir. 1989). Because the Court finds that failing to inform Petitioner of *Beharry* did not substantially prejudice his case, the Court need not determine whether the IJ committed error. *See Larita-Martinez*, 220 F.3d at 1095 (citation omitted).

The *Beharry* court held that

> [S]ection § 212 (h) waivers are available for aliens, including petitioner, who meet its stringent requirements of seven years residence and "extreme hardship" to family if these aliens have been convicted of an "aggravated felony" as defined after they committed their crime, but which was not so categorized when they committed the crime.

183 F. Supp. 2d at 605. The rationale of *Beharry* is not applicable to the present case as Petitioner's June 15, 2000 burglary conviction was categorized as an aggravated felony in 1996. 8 U.S.C. § 1101(a)(43)(G) (Supp. II 1996). Therefore, even if the IJ informed Petitioner of the *Beharry* ruling, it would not have affected the outcome of the deportation hearing because the *Beharry* rationale did not apply to Petitioner. *See Larita-Martinez*, 220 F.3d at 1095 (citations omitted). Therefore, the Court **DENIES** Petitioner's second due process claim.

III. Equal Protection

Petitioner next argues that 8 U.S.C. § 1182(h) violates his equal protection rights because it benefits non lawful permanent residents ("non-LPRs") but does not apply to lawful permanent residents ("LPRs").[4] Petitioner, as an alien, is entitled to the benefits of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-(1886). Nonetheless, Congress has broad power over the expulsion and exclusion of aliens. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Accordingly, "statutory restrictions which limit relief from deportation to certain classes of aliens 'are valid unless wholly irrational.'" *Perez-Oropeza v. INS*, 56 F.3d 43, 45 (9th Cir. 1995) (quotation and citation omitted).

Section 212(h) does treat LPRs differently than non-LPRs. Specifically, an alien is not entitled to a waiver of deportability if (s)he is "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of admission the alien has been convicted of an aggravated felony . . .," 8 U.S.C. § 1182(h). However, the Ninth Circuit recently joined other circuits in holding that § 212(h) does not violate the Equal Protection Clause because "the INS has advanced a rational explanation for the difference in treatment between LPR and non-LPR aggravated felons." *Taniguchi v. Schultz*, 303 F.3d 950, 958 (9th Cir. 2002).

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[4] Although Petitioner specifically petitions the Court to find that the BIA erred in finding that 8 U.S.C. § 1101(a)(43)(G) did not violate the equal protection clause, the Court notes that neither the IJ nor the BIA in its summary affirmance make any finding regarding the constitutionality of 8 U.S.C. § 1101 (a)(43)(G). (*See* Pet.'s Memo., Exh H, I).

Since § 212(h) does not violate equal protection, the Court **DENIES** the petition on that ground.

CONCLUSION

For the reasons stated above, the Court **DENIES** Petitioner Oscar D. Guzman-Santana's petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated: May 30, 2003

/s/ Irma E. Gonzalez
IRMA E. GONZALEZ
United States District
Judge

cc: Magistrate Judge James F. Stiven
All parties

8 U.S.C.A. § 1182(h) (Main Volume 1999)

(h) Waiver of subsection (a)(2)(A)(1)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that –

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status,

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

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8 U.S.C.A. § 1182(h) (Supp. 2004)

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or loss of marijuana if –

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that –

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 1154(a)(1)(A) of this title or classification under clause (ii) or (iii) of section 1154(a)(1)(B) of this title; and

[*See main volume for text of (2)*]

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to

commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

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332 F.3d 1205 (9th Cir. 2003)

Virginia Dumlao TANIGUCHI,
Petitioner-Appellant,

v.

John Paul SCHULTZ; Kathleen Hawy Sawyer; Doris Meissner; John Ashcroft, Attorney General,
Respondents-Appellees.

Virginia Agustin Taniguchi, Petitioner,

v.

John Ashcroft, Attorney General, Respondent.

Nos. 00-16928, 00-71053

United States Court of Appeals,
Ninth Circuit.

Filed June 18, 2003.

Virginia Dumlao Taniguchi, Marysville, CA, pro se.

Jocelyn Burton, Robert Yeargin, USSF – Office of the U.S. Attorney, San Francisco, CA, Linda S. Wernery, DOJ – U.S. Department of Justice, Civil Div./Office of Immigration Lit., for Respondent-Appellee.

Before RONEY,* HUG, THOMAS, Circuit Judges.

Order; Dissent by Judge PREGERSON.

* Honorable Paul H. Roney, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation.

ORDER

PER CURIAM.

The panel has voted to deny the petition for panel rehearing. Judge Thomas has voted to reject the suggestion for rehearing en banc and Judges Roney and Hug have so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

PREGERSON, Circuit Judge with whom Judge REINHARDT joins, dissenting from our court's denial of rehearing en banc.

I respectfully dissent from the order denying rehearing en banc. It is a bedrock principle of our law "that all individuals in the United States – citizens and aliens alike – are protected by the Due Process Clause of the Constitution." *Garberding v. INS,* 30 F.3d 1187, 1190 (9th Cir.1994) (citing *Mathews v. Diaz,* 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)). Furthermore, "[i]t is equally well established that the Due Process Clause incorporates the guarantees of equal protection." *Id.* (citing *Johnson v. Robison,* 415 U.S. 361, 364 n. 4, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974)). In my view, INA § 212(h), 8 U.S.C. § 1182(h), which denies discretionary relief from removal to Legal Permanent Residents (LPRs) convicted of an aggravated felony, but makes such relief available to illegal aliens (non-LPRs) who are convicted of an aggravated felony,

violates the equal protection guarantees afforded all aliens under the Fifth Amendment. Not only does § 212(h) irrationally discriminate against LPRs, but the rationale the panel attributes to Congress to defend § 212(h) against an equal protection challenge is illogical and inconsistent with the statute's purpose.

I believe there is no rational justification for providing the benefit of discretionary relief from removal to non-LPRs who have committed aggravated felonies, while denying the same relief to LPRs who have also committed aggravated felonies. I also believe that § 212(h) is fundamentally unfair because unlike its beneficial treatment of non-LPRs, § 212(h) punishes LPRs who are immigrants that have taken a positive step to become lawful members of American society. Section 212(h) in effect rewards aliens who have committed two crimes – an unlawful entry and an aggravated felony – while punishing aliens who have committed only one crime – an aggravated felony.

The Supreme Court has emphasized that LPRs "like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths,* 413 U.S. 717, 722, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973). For this reason, both Congress and the Supreme Court have historically treated LPRs more favorably than non-LPRs. In *Landon v. Plasencia,* 459 U.S. 21, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982), for example, the Supreme Court stated: "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Landon,* 459 U.S. at 32, 103 S.Ct. 321 (holding that an LPR who left the country for a brief period and was placed in exclusion proceedings upon return was entitled to claim greater procedural protections under the

Due Process Clause than non-LPRs seeking initial entry). Congress has also consistently favored LPRs over non-LPRs. *See, e.g.,* 8 U.S.C. § 1153 (considering LPRs the most favored category in allocation of immigrant visas); 8 U.S.C. § 1229(b) (requiring seven year continuous physical presence requirement for LPRs but ten year requirement for non-LPRs); 8 U.S.C. §§ 1601-1666 (eliminating all welfare benefits for non LPRs but preserving some benefits for LPRs).

I am at a loss to understand how the rationale the panel attributed to Congress to uphold § 212(h) saves it from rational basis scrutiny. The majority concludes that the statute makes a rational distinction between LPRs and non-LPRs because Congress could have believed that LPRs who committed an aggravated felony were more likely to be recidivists than non-LPRs who committed the same crime. The majority reasons that Congress favored non-LPRs over LPRs because it believed that LPRs who commit an aggravated felony are more likely to be recidivist because their substantial employment and family ties in the United States were insufficient to deter them from the criminal conduct that rendered them deportable.

The panel's premise that LPRs have more substantial family relations and employment ties to the United States is contrary to the text and purpose of § 212(h). I emphasize that the INS only grants relief to non-LPRs under § 212(h) if the applicant has strong family ties in the United States. To qualify for § 212(h) relief, a non-LPR must be a "spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence." INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B). Furthermore, the Attorney General is authorized to grant § 212(h) relief to non-LPRs "if it is established to the

satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien."[1] *Id.* In addition, the BIA may grant relief under § 212(h) where a non-LPR can establish other close connections to the United States, including:

> family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community. . . .

Matter of Marin, 16 I. & N. Dec. 581, 584-85, 1978 WL 36472 (1978). Accordingly, the Attorney General may grant a non-LPR discretionary relief under § 212(h) only if the non-LPR has strong family, property, employment, and community ties to the United States. So here's the rub, non-LPRs eligible to receive § 212(h) discretionary relief, under the panel's rationale, would be influenced by the "deterrents" to committing an aggravated felony that the panel assumed LPRs exclusively possess: United States-based families and employment to support their families.[2]

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[1] The majority assumes in its holding, and I agree, that § 212(h) applies to aliens both within the United States and aliens seeking admission into the United States.

[2] By upholding § 212(h) on the basis that Congress could have believed that LPRs were more likely to be recidivists than non-LPRs because LPRs have more substantial family ties to the United States, the panel contravenes our rule that courts examining equal protection

(Continued on following page)

Furthermore, the notion that "aggravated felon LPRs could be viewed as less deserving of a second chance than non-LPRs,"[3] because they have jeopardized their status by committing a crime, is illogical. If anything, non-LPRs have *more* to risk by committing a crime. When a non-LPR commits a crime, he or she risks his or her presence in the United States because both the state and federal government routinely check the immigration status of individuals following an arrest. *See, e.g.,* Cal. Health & Safety Code § 11369 (requiring agency arresting individual for drug crimes to notify the "appropriate agency of the United States having charge of deportation matters" if there is reason to believe the individual may not be a citizen of the United States); 8 U.S.C. § 1357(d) (describing process for federal, state or local law enforcement officials to report an individual arrested for controlled substance crimes when the officer has reason to believe that he or she is not lawfully present in the United States); *Am. G.I. Forum v. Miller*, 218 Cal.App.3d 859, 267 Cal.Rptr. 371 (Cal.App.1990) (upholding against various constitutional

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challenges must be "careful not to attribute to the government purposes which it cannot reasonably be understood to have entertained." *Wauchope v. United States Dept. of State*, 985 F.2d 1407, 1415 (9th Cir.1993) (internal citations and brackets omitted). The plain language of § 212(h) illustrates that it is inconceivable that Congress barred LPRs from § 212(h) discretionary relief because Congress believed that LPRs were less deserving of relief because of their family ties to the United States; family ties are a statutory prerequisite for non-LPRs to obtain relief under § 212(h). Thus, Congress could not have believed that family connections rendered LPRs less worthy of relief because Congress explicitly conditioned eligibility under § 212(h) to non-LPRs who have substantial family ties to a United States citizen or LPR parent, spouse, or child.

[3] *Taniguchi v. Schultz*, 303 F.3d 950, 958 (9th Cir.2002) (internal cite omitted).

challenges California's Automated Regional Justice Information System arrest form which requires arresting officer to ask and record whether the arrestee is an undocumented person in part because officers may have to "notify federal authorities when an arrestee is an illegal alien"). A non-LPR risks removal based on his or her undocumented status *alone* when he or she commits a crime because federal or state officials routinely check arrestees' immigration status. By contrast, when an LPR commits a crime, his or her status as an LPR will not subject him or her to immigration proceedings. Thus, non-LPRs arguably have a more compelling incentive to obey the law than LPRs.

The majority's characterization of § 212(h) relief as a rational "first step" towards the legitimate goal of removing criminal aliens from the United States is also untenable. A piecemeal reform effort does not authorize Congress to draw arbitrary distinctions. Even when Congress takes an incremental step toward a broader reform that creates discrimination against a certain group, the resulting "disparity of treatment" must be rationally related to some legitimate government purpose; Congress' decision to start with LPRs must be rational. *See Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). If Congress' intent was to remove criminal aliens, § 212(h) is not a rational step toward this goal because it makes relief available to people who have committed two crimes while barring relief to those who have committed only one. There is no rational basis for Congress to effectuate its "first step" in streamlining the removal process for *dangerous* aliens by treating LPRs and non-LPRs differently; a more rational distinction would be based on

the nature of the crime rather than on an alien's immigration status.

Because I believe that § 212(h) violates the bedrock concept of equal protection under the law, I respectfully dissent from our court's denial of rehearing en banc.